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Binder

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the matter of the request of Union)
Electric Company for a waiver of underground)
charges and street installation charges at) Case No. EO-88-278
The Villages at Dardenne Springs.)
)

APPEARANCES: Katherine C. Swaller, Attorney, Union Electric Company, Post Office Box 149, St. Louis, Missouri 63166, for Union Electric Company.

Rodric A. Widger, Attorney at Law, Stockard, Andereck, Hauck, Sharp & Evans, Post Office Box 1280, Jefferson City, Missouri 65102, for Cuivre River Electric Cooperative, Inc.

Mark D. Wheatley, Assistant Public Counsel, Post Office Box 7800, Jefferson City, Missouri 65102, for the Office of Public Counsel and the public.

Richard W. French, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102, for the staff of the Missouri Public Service Commission.

HEARING

EXAMINER: Cecil I. Wright.

REPORT AND ORDER

On June 1, 1988, Union Electric Company (UE) filed an application for a waiver of underground charges and street lighting installation charges for a proposed development known as The Villages at Dardenne Springs, now called Twin Chimneys. UE filed this request for waiver under the provisions of 4 CSR 240-14.010(2), which authorizes waivers of the provisions of 4 CSR 240-14 when a public utility is faced with unregulated competition.

On June 14, 1988, Cuivre River Electric Cooperative, Inc. (Cuivre River) filed an application to intervene in these proceedings. UE opposed Cuivre River's intervention by motion filed June 23, 1988. On July 11, 1988, Commission Staff filed

a recommendation concerning the application raising certain issues and requesting a hearing.

The Commission on July 20, 1988, issued an Order Granting Waiver in which it granted UE's application and denied Cuivre River intervention in the proceedings. Cuivre River on July 27, 1988 filed a Motion For Reconsideration. This motion was granted by Commission order issued July 29, 1988. In its order the Commission set an August 12, 1988, hearing date and identified four issues to be addressed by the parties.

One of the issues indicated to be addressed was the intervention of Cuivre River. That issue was rendered moot when Cuivre River withdrew from the case at the hearing.

The hearing was held as scheduled on August 12, 1988, and oral argument was heard at the close of evidence. The reading of the transcript was not waived.

Findings of Fact

Having considered all of the competent and substantial evidence upon the whole record, the Missouri Public Service Commission makes the following findings of fact.

Union Electric Company is a Missouri corporation duly organized and existing under the laws of the state of Missouri. UE is a public utility under the jurisdiction of the Commission pursuant to Chapters 386 and 393, R.S.Mo. 1986. By its application UE is seeking authority to waive the provisions of its tariffs, Sheet No. 40 and Section XIIG of UE's General Rules and Regulations (Exhibit 5) for developer J.L. Mason at a development south of O'Fallon, Missouri, in St. Charles County. The tariffs establish the charges for street lighting, Sheet No. 40, and for underground extensions, Section XIIG. The tariffs require the developer to pay certain of the costs incurred by UE to provide these services.

UE requested the waiver of these charges under the provisions of 4 CSR 240-14.010(2) because of the competition to serve the J.L. Mason development by

Cuivre River. Cuivre River is a rural electric cooperative which has facilities and provides service to the area surrounding the development. Cuivre River is not subject to Commission regulation as to its rates and charges and so comes within the term "unregulated competition".

The evidence indicated that Cuivre River would, if requested, at the time this application was filed, offer to provide underground facilities to the development without charges similar to those in UE's tariffs. J.L. Mason at the time of the application indicated it would take service from Cuivre River if UE could not waive the charges in its tariffs.

At the time of the application J.L. Mason was seeking to have the development annexed by Dardenne Prairie. The only evidence is that Dardenne Prairie has an approximate population of 800 residents. J.L. Mason determined that Dardenne Prairie did not have suitable municipal services for a development of 858 lots and so, to counter the Dardenne Prairie annexation, sought and obtained annexation by the city of O'Fallon. O'Fallon's population, at the 1980 census, was over 8,000 persons.

The annexation of the development by O'Fallon effectively prevented Cuivre River from competing to provide service to the development. Pursuant to Sections 394.020 and 393.080, R.S.Mo. 1986, Cuivre River as a rural electric cooperative cannot provide additional service to an area which is incorporated into a city, town or village of 1,500 or more residents. Lawrence J. Maynes, president of Mason's Missouri division, indicated that he would have to consider his legal alternatives if UE was required to charge him the tariffed rates. UE is the only public electric utility with a franchise to provide electric service in the city of O'Fallon.

To provide service to the development UE decided to build an extension from an existing line running south from Interstate 70. This extension would be built from an existing extension to the junction of county roads K and N. UE has a certificate of convenience and necessity from the Commission for the line running along Interstate 70 but not for the first extension. The first extension has been

in existence for approximately 25 years. UE has not sought a certificate for the second extension to the junction of county roads K and N. The initial extension is approximately 3.2 miles in length. The second extension is approximately 2.8 miles in length. UE has another certificated line approximately 1.2 miles from the development from which it could have built an extension.

There are several issues to be addressed by the Commission with regard to this application. Three of the issues are specific to this application. They are: (1) the need for authority for UE to extend its lines to provide service to the development; (2) the amount of the charges to be waived and the potential for recovery of these charges through revenues within a reasonable amount of time; and (3) whether UE is faced with unregulated competition for this development. The fourth issue is whether the waiver of tariff charges is a promotional practice under 4 CSR 240-14, and the fifth issue is whether tariffed charges can be waived without a provision in the tariffs that allows waiver.

The issue concerning the authority of UE to provide service to the development from a second extension from a certificated line arises because the area in question is not within an area for which UE has an area certificate to provide service. UE serves this area from lines for which UE has been granted authority. To serve new customers as the area has developed, UE has built extensions from its certificated lines.

UE's authority to build these extensions was questioned as early as 1956. RE: Cuivre River Electric Cooperative, Inc. v. Missouri Edison Co., 7 Mo. P.S.C. (N.S.) 118 (1956). UE is the successor of Missouri Edison Company. In that early Cuivre River complaint the Commission found that a 2½-mile extension from a certificated line was reasonable and UE did not need to seek additional authority to build the extension.

UE has made extensions throughout the areas it serves from its certificated lines based upon the Cuivre River decision. This case, though, presents a somewhat

different aspect of this issue. Here, UE is building a second extension from the first extension. This "stacking" of extensions has not been addressed by the Commission, although the issue is before the Commission in Howard County Electric Cooperative v. UE, Case No. EC-87-148.

The Commission has considered this issue and reaffirms its earlier decision that a utility may build extensions from certificated lines for reasonable distances to serve new customers. Even though the first extension, in this case, was more than 2½ miles, the Commission has determined that 3.2 miles is still a reasonable distance. The Commission believes, though, that extensions much beyond this length stretch the intent of the Cuivre River decision.

The Commission has determined that stacking of extensions is not a reasonable application of the decision in Cuivre River. In another decision concerning extensions from certificated lines, the Commission held that "[a]n electric company has the right to make connections from an electric line authorized by the Commission in a previous case for reasonable distances and purposes and providing such service can be rendered by extending a lateral distribution line from its main transmission line." RE: Diekroeger, 9 Mo. P.S.C. (N.S.) 127, 138-139 (1960). A second extension from the initial lateral extension from a certificated line does not meet the requirement in Diekroeger of a lateral extension from a main transmission line. As new extensions are made, UE would be moving into new territory where it has not sought authority to serve and where the Commission has made no determination of whether this extension into new territory is in the public interest.

In this particular case, though, the Commission does not believe UE has extended into territory which it has not sought to serve. The evidence showed that UE has a certificated line within 1.2 miles of the development. UE could have built this extension from that line but chose for engineering reasons to build the second extension from the Interstate 70 line. The Commission finds that, under these circumstances, the second extension was reasonable.

The Commission is also aware that UE has an application for an area certificate which would remove this issue of reasonable extensions from line certificates. Case No. EA-88-159. Until a decision is issued in that case UE should file for certificates to build extensions from those extensions authorized by the Cuivre River and Diekroeger cases.

On June 28, 1971, the Commission issued General Order No. 52, which required all facilities in new subdivisions, with certain exceptions, be constructed underground. 16 Mo. P.S.C. (N.S.) 49 (1971). General Order 52 was promulgated as a rule by the Commission. 4 CSR 240-20.020. This rule was rescinded in August 1983. The construction of underground facilities by UE is now governed solely by UE's tariffs.

Under UE's current tariffs, customers or developers are required to pay certain charges for the construction of underground facilities. In this case those charges total approximately \$870,700. The charges for which the waiver is requested are: per lot charges of \$150 a lot x 858 lots for \$128,700; service trench and conduit charges of \$200 a lot x 858 lots for \$171,600; underground street light cable, \$220 a light x 125 lights for \$27,500; meter bases for \$25 to \$50 x 858 lots for \$42,900; and an underground primary feeder line of \$500,000. The underground feeder line is specifically necessary since UE does not already have facilities in the area. The total cost of constructing facilities in the development after the development is completed will be approximately \$1.9 million.

UE will install the underground facilities as the construction of the development proceeds. The revenue from the development will begin once residents occupy the homes in the development. When the development is completed, estimated at three years, UE will receive \$643,500 per year in revenue. (Exhibit 6). Based upon these figures, UE will receive approximately \$1,930,500 in revenue over a three-year period to cover its \$1.9 million costs. These figures do not include the costs

associated with providing electric service, nor do they include revenue associated with the first three years of the development.

The Commission has determined that the revenue to be generated by the development upon completion will, in three years, reasonably approximate the costs of the development. The amount of charges requested to be waived is substantial but not unreasonable based upon the size of the development. The single largest charge requested to be waived is that of the underground primary feeder line. This charge is the excess the underground primary feeder line costs over an overhead primary feeder line. The only evidence in the record is that St. Charles County zoning requires undergrounding of the primary feeder line. Based upon this evidence, the Commission finds that the undergrounding of the primary feeder line is necessary and reasonable.

The facts surrounding the issue of whether UE is faced with unregulated competition in this case have changed since the filing of the application. At the time of the application the development was located in an unincorporated area of St. Charles County. Cuivre River is authorized to provide service in unincorporated areas and so UE was faced with matching any inducements made by Cuivre River to J.L. Mason.

On August 4, 1988, the city of O'Fallon, with over 8,000 residents, annexed the development. Once the development was annexed into an incorporated area of more than 1,500 residents, Cuivre River could no longer offer service to the development. Maynes indicated J.L. Mason might attempt to reverse the annexation if UE forces them to pay the charges for undergrounding. UE argues that the Commission should consider this threat by J.L. Mason and the overall competition by Cuivre River in the general area in deciding this issue. Staff and Public Counsel argue that the annexation effectively removes the competition of Cuivre River.

Although the Commission understands UE's concerns about its relationship with developers throughout the area UE serves, the Commission does not believe this

case can be decided on that basis. As a developer, Maynes preferred UE to Cuivre River. In addition, J.L. Mason in this instance was seeking the benefits of an incorporated area and sought incorporation by O'Fallon to prevent annexation by Dardenne Prairie. Under current rules the only circumstance for waiving the costs is to meet unregulated competition. The Commission finds that annexation effectively removes any threat of unregulated competition for service to this area. On this basis the Commission will deny this application.

The Commission does not believe developers will, en masse, refuse to take service from UE because of this decision. The Commission believes that developers will make their decisions concerning from which utility to take service on UE's ability to serve and the perceptions of UE rather than in reaction to this Report And Order.

Since the Commission has determined that the application should be denied, it has determined it need not discuss in detail the two general issues set out above. These issues, though, are of concern to the Commission and it will request its Staff to review the question of, first, whether the waiver of underground charges is a promotional practice and, second, whether the Commission can waive those charges established by tariffs through its rulemaking authority. The provisions of Section 393.130 prohibit discrimination within a classification and the Commission is concerned that the waiver of tariffed charges by rule may violate these provisions.

The Commission seriously questions whether the construction of underground facilities is a "promotional practice" as contemplated by 4 CSR 240-14 and therefore can be waived. The Commission believes this is consistent with the provisions of 4 CSR 240-14.030(3), which states a promotional practice "shall not vary the rates, charges, rules and regulations of the tariff pursuant to which service is rendered to a customer." The waiver sought by UE in this case is a waiver of charges for service. The only charges requested to be waived which might constitute a promotional practice under 4 CSR 240-14 are meter base charges. Since UE does not

normally provide meter bases to customers and the charges are not tarified, it seems reasonable that provision of meter bases by UE is a promotional practice and should be treated as such under 4 CSR 240-14.

The Commission is aware of the history of granting waivers of underground charges pursuant to the waiver provisions of 4 CSR 240-14.010(2) and so will not render a final decision on this issue at this time. The Commission, though, believes the issue should be addressed and will request its Staff to investigate this issue for Commission review at some later time.

The Commission is also aware of the need for expediting applications for waivers where there is effective unregulated competition. The Commission has therefore determined it shall follow its current procedures for expediting such applications until the issues discussed above are resolved.

Conclusions

The Missouri Public Service Commission has arrived at the following conclusions.

The Commission has jurisdiction over the rates and charges of a public utility under the provisions of Section 393.130, R.S.Mo. 1986. The Commission may make and interpret rules to carry out its statutory authority. State ex rel. Hoffman v. P.S.C., 530 S.W.2d 434, appeal after remand, 550 S.W.2d 875.

This application for waiver was filed pursuant to Commission rule 4 CSR 240-14.010(2), which authorizes a waiver of the provisions of 4 CSR 240-14 to meet unregulated competition. The Commission found, and concludes, that once the city of O'Fallon annexed the development of Twin Chimneys, there is no longer competition from an unregulated utility and therefore the waiver cannot be granted.

It is, therefore,

ORDERED: 1. That the application for waiver of charges for the Twin Chimneys development is hereby denied.

ORDERED: 2. That Commission Staff shall review the facts of this case and the provisions of 4 CSR 240-14 to determine whether the Commission can provide for the waiver of tariffed rates by rulemaking. Staff shall report to the Commission within sixty (60) days of the effective date of this order.

ORDERED: 3. That this Report And Order shall become effective on the 30th day of August, 1988.

BY THE COMMISSION

Harvey G. Hubbs
Harvey G. Hubbs
Secretary

(S E A L)

Steinmeier, Chm., Musgrave,
Hendren and Fischer, CC., Concur
and certify compliance with the
provisions of Section 536.080,
R.S.Mo. 1986.
Mueller, C., Absent.

Dated at Jefferson City, Missouri,
on this 19th day of August, 1988.